BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ESTHER M. ROBINSON	)	
Claimant	)	
	)	
VS.	)	
	)	
RICHMOND CARE CENTER, LLC	)	
Respondent	)	Docket No. 1,019,933
	)	
AND	)	
	)	
KANSAS HEALTHCARE ASSOCIATION	)	
WORKERS COMPENSATION INS. TRUST	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 1, 2006 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on August 8, 2006.

APPEARANCES

Derek R. Chappell, of Ottawa, Kansas, appeared for the claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed to the following findings:

1. No one disputes the 12.5 percent whole body functional impairment assessed by the ALJ;
2. Claimant is entitled to future medical benefits upon proper application; and
3. Claimant is entitled to an unauthorized medical allowance.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered a low back injury in the course of her employment with the respondent, and that as a result of that injury, claimant is entitled to a 60 percent work disability, based upon a 100 percent wage loss and a 50 percent task loss and giving respondent a 15 percent pre-existing credit under K.S.A. 44-501.

The respondent appealed arguing claimant is not, under Kansas law, entitled to benefits beyond her 12.5 percent whole body functional impairment. According to respondent, claimant suffered an earlier injury in 1998 which left her with permanent work restrictions. And any task loss she might have sustained was not caused by the injury at issue in this claim, but rather was attributable to her 1998 injury. Accordingly, her recovery is limited to her functional impairment.

If the Board finds work disability is appropriate, respondent argues the claimant did not make a good faith effort to find employment after her injury and therefore a wage, based upon the federal minimum wage of $5.15 per hour, should be imputed to her, thereby lowering her ultimate work disability.

Claimant acknowledges she received permanent work restrictions following her earlier 1998 injury. But following that injury she demonstrated the ability to work in the same profession, a certified nurse's aide, which required her to work in excess of her recommended restrictions for over 4 years. Accordingly, claimant argues that she is entitled to work disability over and above her functional impairment attributable to her 2004 accident.

Claimant also maintains that she has made a good faith effort to find post-injury employment as evidenced by her list of potential employment contacts. As such, claimant contends the ALJ's Award is well reasoned and should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant has been employed as a CNA (certified nurse's assistant) by various employers over the past 15 years. In 1998, she suffered an injury to her low back while working for another employer. According to claimant, this injury not only hurt her low back, but she also experienced radiating pain into her knee. She was treated conservatively with medications and therapy and released to return to work, with restrictions, in 1999. Her complaints flared up sporadically, but over time she improved. Claimant returned to work,

performing her regular duties from 1999 to 2004. Then in 2004, she became employed by this respondent, again as a CNA.

On October 7, 2004, the claimant was injured while transferring a patient from a bed to a wheelchair. She felt "sharp pains in the lower right-hand side of my back"[1]. The claimant continued and got the patient in the wheelchair and then yelled for assistance. Claimant was able to finish the rest of her shift, but her pain continued to get worse. She testified that her pain went down into her right leg and into her foot.[2]

When claimant's symptoms did not subside, she was referred to Dr. Stephen Reintjes. On January 28, 2005, Dr. Reintjes examined her and diagnosed a calcified disk between the 2nd and 3rd lumbar vertebra which was causing a narrowing of her spinal canal. He also diagnosed a disk bulge between the 4th and 5th lumbar vertebra. In connection with his examination, Dr. Reintjes compared claimant's earlier MRI scan, dating back to 1999, to a later scan done in 2005. At his deposition he testified that the only difference between the two MRI scans was the disk herniation at the 2nd and 3rd vertebra and that change was, in his view, attributable to her October 2004 accident.

Dr. Reintjes recommended surgery and ultimately performed a 2 level decompressive lumbar laminectomy. He did not remove the disk due to the calcification, but he shaved off some of the disk creating more room within the spine thereby lessening the pressure on claimant's nerves.

Dr. Reintjes testified that he believed claimant had a good result from the surgery and he released her to return to work but with restrictions, including a 35 pound lifting restriction and a recommendation that she limit her bending and twisting. Dr. Reintjes also testified that claimant sustained a loss of 3 out of 7 tasks as itemized within Michael Dreiling's vocational analysis.

Claimant was also evaluated by Dr. Edward J. Prostic at her attorney's request. Dr. Prostic had examined claimant in connection with an earlier work-related injury claimant sustained in 1998. Following that injury, Dr. Prostic noted claimant's complaints of low back pain with pain radiating into the "right knee and sometimes below."[3] He diagnosed a disc protrusion at L4-5 superimposed upon pre-existing congenital spinal stenosis. Dr. Prostic imposed restrictions which recommended claimant "avoid lifting weights greater than 30 pounds occasionally, 15 pounds frequently, or 5 pounds constantly. She should

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[1] R.H. Trans. at 8.

[2] *Id.* at 10.

[3] Prostic Depo., Ex. 4 at 2 (Jan. 24, 2000 report).

avoid frequent bending or twisting at the waist, forceful pushing or pulling, use of vibrating equipment, or captive positioning."[4]

Dr. Prostic re-examined claimant in August 2005 in connection with the pending claim. His finding were identical to those noted by Dr. Reintjes and in fact he agreed with Dr. Reintjes' restrictions. In addition, he recommended that she avoid captive position or use of vibrating equipment.

Dr. Prostic testified that although the restrictions rendered following both the 1998 and 2004 accidents were very similar, claimant quite clearly had a worsening of her condition following her 2004 accident as evidenced by the fact that she had surgery to address her condition and relieve her symptoms. And the number of hours or time she is now allowed to sit, walk or drive is more restrictive based upon his restrictions. Thus, according to him, claimant has a task loss of 4 out of the total 7.

Claimant has not returned to work anywhere. Respondent's ownership changed hands and claimant was told her services were no longer required. She produced a list of 80 potential employers she has contacted and also testified that she has used the state resources for finding a job as well as consulting newspaper ads. Unfortunately, she has had only one interview since her release from treatment in June 2005, and as of the date of the regular hearing, she had not found a job. Admittedly, claimant has filled out only one application among the 80 potential employers. However, there is no indication that claimant is refusing to fill out applications. All that is known is that claimant has continually sought employment by contacting potential employers. The dates of her contacts and the person she spoke to is contained within her job search records.

The ALJ concluded that claimant sustained a 12.5 percent whole body functional impairment, a finding which the parties do not dispute. Because this is an unscheduled whole body injury, the ALJ necessarily had to determine whether and to what extent claimant might qualify for a work disability.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost**

[4] *Id.*, Ex. 4 at 3.

> **the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[7]

The ALJ concluded claimant had demonstrated a good faith effort in attempting to find employment and as such, he found claimant's wage loss was 100 percent. And he averaged the two task loss opinions offered by the physicians and assigned a 50 percent task loss. According to the Award, the ALJ was not persuaded by respondent's contention that claimant's task loss was due to her 1998 injury rather than the 2004 injury at issue herein. He stated that following the 1998 injury claimant returned to her CNA - type job -

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id.* at 320.

> . . . and did it for 4 or 5 years before the present injury. The claimant's work history after the 1998 back injury demonstrated that she had the ability to perform work in excess of the stated restrictions. Therefore, the claimant's task loss is considered to be due to restrictions from the present injury, and not due to restrictions from the 1998 injury.[8]

In doing so, the ALJ analogized this case to the Board's decision in *King.*[9] In *King*, this Board concluded that because Mr. King was able to return to work following an earlier injury, in spite of the imposition of permanent restrictions, he was thereafter entitled to claim a task loss following a subsequent injury. Essentially, this Board concluded that the earlier work restrictions were, based on Mr. King's work performance and the job's requirements, unnecessary. So, when he later was assessed restrictions and was left with a task loss, the employer was properly responsible for the resulting task loss.

The ALJ distinguished *Surls,*[10] a case respondent cites for the proposition that a claimant cannot "bank" work disability benefits. *Surls* involved a claimant who injured his back while working for his employer. He returned to work in an accommodated capacity with a different but ownership-related company, earning the same wages. After less than a month at the accommodated position, he re-injured his back, performing duties outside of his restrictions. He was later released with the same functional impairment and permanent work restrictions issued following the first accident. The ALJ reasoned that *Surls* was distinguishable based upon the facts. In *Surls*, there was but a "few weeks to a year" between the claimant's return to work in an accommodated position and the re-injury.

The Board, like the ALJ, finds that *King* and not *Surls* is applicable under these facts. While claimant had a low back injury in 1998, there was a distinct difference in her spine following the 2004 injury as testified to by both Dr. Prostic and Dr. Reintjes. Claimant returned to work following her 1998 injury, performing essentially all the same duties without incident until 2004. In 2004, claimant sustained a new injury and as a result, respondent bears liability for the resulting wage and task loss. The Board affirms the ALJ's finding that respondent is liable for claimant's 100 percent wage loss and the 50 percent task loss.

The ALJ went on to average the two components with the result being 75 percent. The ALJ also concluded that, based upon Dr. Prostic's testimony, claimant had a pre-existing 15 percent impairment and when that figure is deducted from the 75 percent, the

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[8] ALJ Award (May 1, 2006) at 4.

[9] *King v. Salina Planing Mill, Inc.*, No. 1,008,989, 2004 WL 2337680 (Kan. WCAB Sept. 30, 2004).

[10] *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

net result, and hence the Award, was 60 percent. Neither party contested the pre-existing impairment finding of 15 percent and therefore, the Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated May 1, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier